

1 Cliff Cantor, WSBA # 17893
2 Law Offices of Clifford A. Cantor, P.C.
3 627 208th Ave. SE
4 Sammamish, WA 98074
5 (425) 868-7813

6 *Liaison Counsel for Plaintiffs*

7 [additional counsel on signature page]

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10
11 In re IsoRay, Inc. Securities
12 Litigation

13
14 This document relates to:
15 All actions

Master File No. 4:15-cv-5046-LRS

**PLAINTIFFS' MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND
PLAN OF ALLOCATION**

March 7, 2017

With Oral Argument 10:30 a.m.
Yakima Courthouse

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
I. OVERVIEW OF THE LITIGATION	6
II. THE COURT SHOULD APPROVE THE SETTLEMENT BECAUSE IT IS FAIR, REASONABLE AND ADEQUATE TO THE CLASS	9
A. Standard.....	9
B. All of the Relevant Factors Employed by Courts in This Circuit Favor Approval of the Proposed Settlement	11
1. Strength of Plaintiffs’ Case, and the Risk, Expense, Complexity and Likely Duration of Further Litigation	11
a. Difficulty of Proving Exchange Act Claims	12
i. Risk of Proving Falsity and Scienter.....	12
ii. Risk of Proving Loss Causation and Damages	15
b. Pragmatic Considerations	16
2. The Amount Offered in the Settlement Favors Approval	19
3. Risk of Maintaining a Class Action	20
4. Stage of the Proceedings	21
5. Experienced Counsel Concur that the Settlement, Which was Negotiated in Good Faith and at Arm’s-Length, is Fair, Reasonable, and Adequate	22
6. The Reaction of the Class Members to the Settlement.....	24
III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION	25
IV. CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

<i>Aarons v. BMW of N. Am., LLC,</i>	
2014 U.S. Dist. LEXIS 118442 (C.D. Cal. Apr. 29, 2014)	15
<i>Browne v. Am. Honda Motor Co.,</i>	
2010 U.S. Dist. LEXIS 145475 (C.D. Cal. July 29, 2010)	17
<i>City of Providence v. Aeropostale, Inc.,</i>	
2014 U.S. Dist. LEXIS 64517 (C.D. Cal. June 10, 2005)	12
<i>Ellis v. Naval Air Rework Facility,</i>	
87 F.R.D. 15 (N.D. Cal. 1980)	23
<i>Gebhart v. S.E.C.,</i>	
595 F.3d 1046 (9th Cir. 2014)	13
<i>Hanlon v. Chrysler Corp.,</i>	
150 F.3d 1011 (9th Cir. 1998)	10, 19, 25
<i>In re Am. Apparel S'holder Litig.,</i>	
2014 U.S. Dist. LEXIS 184548 (C.D. Cal. July, 28 2014)	14, 15
<i>In re Cathode Ray Tube Antitrust Litig.,</i>	
2016 U.S. Dist. LEXIS 24951 (N.D. Cal. Jan. 28, 2016)	23, 26
<i>In re Cendant Corp. Litig.,</i>	
264 F.3d 201 (3d. Cir. 2001)	20
<i>In re Convergent Techs. Sec. Litig,</i>	
948 F.2d 507 (9th Cir. 1991)	12
<i>In re Galena Biopharma, Inc., Sec. Litig.,</i>	
117 F. Supp. 3d 1145 (D. Or. Aug 5, 2015)	13

1	<i>In re Global Crossing Sec. & ERISA Litig.</i> ,	
2	225 F.R.D. 436 (S.D.N.Y. 2004).....	26
3	<i>In re Heritage Bond Litig.</i> ,	
4	2005 U.S. Dist. LEXIS 13555 (C.D. Cal. June 10, 2005)	<i>passim</i>
5	<i>In re Ikon Office Solutions, Inc.</i> ,	
6	194 F.R.D. 166 (E.D. Pa. 2000)	18
7	<i>In re Mego Fin. Corp. Sec. Litig.</i> ,	
8	213 F.3d 454 (9th Cir. 2000).....	10, 19, 25
9	<i>In re NVIDIA Corp. SEC. Litig.</i> ,	
10	768 F. 3d 1046 (9th Cir. 2014)	13, 14
11	<i>In re NVIDIA Corp. Secs. Litig.</i> ,	
12	2011 U.S. Dist. LEXIS 117807	14
13	<i>In re Oracle Sec. Litig.</i> ,	
14	1994 U.S. Dist. LEXIS 21593 (N.D. Cal. June 18, 1994)	26
15	<i>In re Pfizer Inc. Sec. Litig.</i> ,	
16	2014 U.S. Dist. LEXIS 184548 (C.D. Cal. July, 28, 2014)	15
17	<i>In re Syncor Litig.</i> ,	
18	516 F.3d 1095 (9th Cir. 2008).....	18
19	<i>In re TD Ameritrade Acc't Holder Litig.</i> ,	
20	2011 U.S. Dist. LEXIS 103222 (N.D. Cal. Sept. 13, 2011)	22
21	<i>In re Warner Comm. Sec. Litig.</i> ,	
22	618 F. Supp. 735 (S.D.N.Y. 1985)	15
23	<i>Linney v. Alaska Cellular P'ship</i> ,	
24	1997 U.S. Dist. LEXIS 24300 (N.D. Cal. July 18, 1997)	11

1	<i>Linney v. Cellular Alaska P'ship,</i>	
2	151 F.3d 1234 (9th Cir. 1998).....	10, 11, 22
3	<i>National Rural Telecom. Coop. v. DIRECTV, Inc.,</i>	
4	221 F.R.D. 523 (C.D. Cal. 2004)	18, 21
5	<i>Nobles v. MBNA Corp.,</i>	
6	2009 U.S. Dist. LEXIS 59435 (N.D. Cal. June 29, 2009).....	16
7	<i>Officers for Justice v. Civil Serv. Comm'n.,</i>	
8	688 F.2d 615 (9th Cir. 1982).....	10, 19
9	<i>Robbins v. Koger Props., Inc.,</i>	
10	116 F.3d 1441 (11th Cir. 1997).....	22
11	<i>Roberti v. OSI Sys., Inc.,</i>	
12	2015 U.S. Dist. LEXIS 164312 (C.D. Cal. Dec. 8, 2015).....	11, 23
13	<i>Rodriguez v. West Publishing Corp.,</i>	
14	563 F.3d 948 (9th Cir. 2009).....	23
15	<i>Torrissi v. Tucson Elec. Power Co.,</i>	
16	8 F.3d 1370 (9th Cir. 1993).....	18
17	<i>Varjabedian v. Emulex Corp.,</i>	
18	152 F. Supp. 3d 1226 (C.D. Cal. 2016)	14
19	<i>Viscaino v. U.S. District Court,</i>	
20	173 F.3d 713, 721 (9th Cir. 1999).....	21

Other Authorities

23	Manual for Complex Litigation (Third) § 30.42 (1995).....	23, 24
----	---	--------

1 Lead Plaintiffs Bodgan Ostrowski, Joseph Kavanaugh, and Patrick
 2 McNamara (“Lead Plaintiffs”) and named Plaintiffs Timothy Yuen and JM Zulueta
 3 (collectively with Lead Plaintiffs, the “Plaintiffs”), through their undersigned
 4 counsel, move for final approval of the proposed class action Settlement, as set forth
 5 in the Stipulation of Settlement filed at ECF No. 86-1 (the “Stipulation”).¹

6 This Action will be settled for a cash payment in the amount of \$3,537,500.
 7 The proposed Settlement will inure to the benefit of investors in IsoRay, Inc.,
 8 (“IsoRay”) to settle their claims against Defendants. The Settlement results from
 9 Plaintiffs’ vigorous case prosecution and arm’s-length settlement negotiations
 10 between the parties.

11 **I. OVERVIEW OF THE LITIGATION**

12 On May 22, 2015, this Litigation was filed as a class action on behalf of
 13 purchasers of IsoRay securities. By Order dated August 17, 2015, this Court
 14 appointed Bogdan Ostrowski, Joseph Kavanaugh, and Patrick McNamara as Lead
 15 Plaintiffs and appointed The Rosen Law Firm, P.A. and Wolf Haldenstein Adler
 16 Freeman & Herz LLP as Co-Lead Counsel (“Co-Lead Counsel”). ECF No. 39.
 17 *See* Joint Declaration of Matthew M. Guiney and Phillip Kim, submitted herewith
 18 (“Joint Decl.”) at ¶ 4.

19 On October 16, 2015, Plaintiffs filed an Amended Complaint (the
 20 “Complaint”), on behalf of purchasers of IsoRay common stock between May 20,
 21 2015 and May 21 2015, inclusive (the “Settlement Class Period”) against
 22 Defendants. ECF No. 55. Joint Decl. at ¶ 5.

23 The Complaint seeks damages based on allegations that Defendants violated
 24

¹ Capitalized terms herein have the same meanings as in the Stipulation.

1 Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), and that
 2 the Individual Defendant violated Section 20(a) of the Exchange Act. The Complaint
 3 alleges, *inter alia*, that Defendants knowingly and/or recklessly issued false and
 4 misleading statements in a company press release (the “Press Release”) which
 5 misrepresented the findings of a clinical study (the “Study”) concerning the
 6 effectiveness of IsoRay’s Cesium 131 product in treating cancer by failing to
 7 disclose and discuss the performance of other treatment options that were compared
 8 in the Study. Joint Decl. at ¶ 6.

9 On December 15, 2015, Defendants filed a motion to dismiss in which they
 10 argued that, *inter alia*, (i) Plaintiffs failed to allege material false statements or
 11 particularized facts sufficient to give rise to a strong inference of Defendants’
 12 scienter; (ii) IsoRay did not have a duty to discuss the other treatment options in the
 13 Press Release, and (iii) Plaintiffs could not prove loss causation. ECF No. 61. On
 14 February 16, 2016, Plaintiffs filed their opposition to the motion to dismiss. ECF
 15 No. 65. On April 1, 2016, Defendants filed their reply. ECF No. 70.

16 On May 12, 2016, the parties appeared before the Court for a hearing on the
 17 motion to dismiss. On June 1, 2016 the Court issued an order denying the motion to
 18 dismiss. The same day, the Court issued a Notice setting a scheduling conference
 19 and directed the Parties to confer in advance of the status conference concerning a
 20 proposed discovery plan. ECF No. 75. Joint Decl. at ¶ 8.

21 The Parties met and conferred concerning a proposed discovery plan and
 22 submitted a proposed schedule, which the Court adopted by order on July 19, 2016.
 23 ECF No. 79. The Parties began the process of discovery in accordance with the
 24 discovery schedule, including propounding and responding to document requests,

1 issuing subpoenas to various non-parties, and receiving responses. This occurred
2 prior to settlement discussions. Joint Decl. at ¶ 9.

3 On September 14, 2016, the Parties met with mediator Michelle Yoshida,
4 Esq., in New York for an all-day mediation session. In advance of the mediation, the
5 Parties held separate conference calls with Ms. Yoshida and exchanged mediation
6 briefs outlining the Parties' respective positions and expert damages analyses. Joint
7 Decl. at ¶ 10.

8 At the conclusion of the mediation, which included extensive negotiations by
9 counsel, Ms. Yoshida made a mediator's proposal to settle the case for \$3,537,500.
10 Joint Decl. at ¶ 11. Pursuant to the mediator's proposal, the Parties reached an
11 agreement-in-principle to settle the case. Since then, the Parties have negotiated and
12 drafted the relevant settlement documentation. Joint Decl. at ¶ 11.

13 On October 3, 2016, Plaintiffs filed an unopposed motion for entry of order
14 preliminarily approving settlement and establishing notice procedures. ECF No. 86.
15 On October 20, 2016, this Court entered an order granting preliminary approval of
16 the settlement and setting a calendar for distribution of notice to the Class along with
17 briefing of and a hearing for final approval of the Settlement. ECF No. 87.

18 The parties have complied with the Court's preliminary approval order and its
19 schedule for dissemination of the Notice, Summary Notice, and Proof of Claim. The
20 Court-approved Claims Administrator — Strategic Claims Services — mailed the
21 Notice and Proof of Claim by first-class mail, postage prepaid, on October 27, 2016,
22 within the 28-calendar-day deadline that the Court set. Joint Decl. at ¶ 13. *See also*
23 Exhibit C. Plaintiffs' Counsel and the Claims Administrator caused the Summary
24 Notice to be published electronically on *GlobeNewswire* and in print in the

1 *Investor's Business Daily* on October 20 and 31, 2016, respectively, within the 10-
2 calendar-day deadline that the Court set. Joint Decl. at ¶ 14. *See also* Exhibit C.

3 To date, **not a single class member** has objected to any aspect of the
4 Settlement and only one class member has requested to be excluded from the
5 Settlement. Joint Decl. at ¶ 15. *See also* Exhibit C.

6 The Settlement is the product of a realistic assessment by knowledgeable and
7 experienced attorneys of the risks of further proceedings and the benefits that the
8 Class will obtain now. These risks include the inherent risks of proving falsity,
9 scienter, loss causation, and damages, and the risk that the Class will never collect
10 on any judgment it obtains. Joint Decl. at ¶ 16.

11 The Settlement also confers an immediate and substantial benefit on the
12 Settlement Class. Specifically, it provides a recovery of approximately 17.5% to
13 30% of the Class's estimated maximum damages amount. Joint Decl. at ¶ 17. The
14 Settlement also eliminates the risk, expense and uncertainty of continued litigation
15 under circumstances where a more favorable outcome was at risk. Joint Decl. at ¶ 17.
16 By any measure, the Settlement is fair, reasonable, and adequate, and is an excellent
17 result for the Class. Joint Decl. at ¶ 17.

18 **II. THE COURT SHOULD APPROVE THE SETTLEMENT BECAUSE** 19 **IT IS FAIR, REASONABLE AND ADEQUATE TO THE CLASS**

20 **A. Standard**

21 Federal Rule of Civil Procedure 23(e) provides that "[t]he court must approve
22 any settlement, voluntary dismissal, or compromise of the claims, issues, or
23 defenses." In deciding whether to approve a proposed settlement, the Ninth Circuit
24 has a "strong judicial policy that favors settlements, particularly where complex

1 class action litigation is concerned.” *Linney v. Cellular Alaska P’ship*, 151 F.3d
 2 1234, 1238 (9th Cir. 1998) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d
 3 1268, 1276 (9th Cir. 1992)). Thus, in assessing the Settlement under Rule 23(e), the
 4 Court must only intrude upon what is otherwise a private consensual agreement
 5 negotiated among the parties to the extent necessary to reach a reasoned judgment
 6 that: (a) the agreement is not the product of fraud or overreaching by, or collusion
 7 between, the negotiating parties; and (b) that the settlement taken as a whole is fair,
 8 reasonable, and adequate to all concerned. *In re Mego Fin. Corp. Sec. Litig.*, 213
 9 F.3d 454, 458 (9th Cir. 2000).

10 There is no prescribed settlement approval procedure to be followed in this
 11 Circuit. Rather, “the decision to approve or reject a settlement is committed to the
 12 sound discretion of the trial judge because [the trial judge] is exposed to the
 13 litigants, and their strategies, positions and proof.” *Hanlon v. Chrysler Corp.*, 150
 14 F.3d 1011, 1026 (9th Cir. 1998).

15 To avoid excessive intrusion into the parties’ compromise, the court
 16 considers the settlement taken as a whole, rather than its individual component
 17 parts, and examines it for overall fairness. *Officers for Justice v. Civil Service Com.*,
 18 688 F.2d 615, 628 (9th Cir. 1982). Consequently, a settlement hearing is “not to be
 19 turned into a trial or rehearsal for trial on the merits,” nor should the proposed
 20 settlement “be judged against a hypothetical or speculative measure of what might
 21 have been achieved by the negotiators.” *Id.* at 625.

22 Rather, “[t]he involvement of experienced class action counsel and the fact
 23 that the settlement agreement was reached in arm’s length negotiations, after
 24 relevant discovery had taken place create a presumption that the agreement is fair.”

1 *Roberti v. OSI Sys., Inc.*, No. 13-9174, 2015 U.S. Dist. LEXIS 164312, *9 (C.D.
 2 Cal. Dec. 8, 2015) (quoting *Linney v. Cellular Alaska P'ship*, No. 96-3008, 1997
 3 U.S. Dist. LEXIS 24300, *16 (N.D. Cal. July 18, 1997)).

4 As explained below, the Settlement was reached after extensive investigation
 5 and litigation by experienced counsel on both sides, and then only after protracted
 6 arms'-length negotiations. Under these circumstances, the Settlement has the
 7 presumption of fairness.

8 **B. All of the Relevant Factors Employed by Courts in**
 9 **This Circuit Favor Approval of the Proposed Settlement**

10 To determine whether a proposed settlement is fair, reasonable, and adequate,
 11 a court must examine the following factors: (1) the strength of the plaintiffs' case;
 12 (2) the risk, expense, complexity, and likely duration of further litigation; (3) the
 13 amount offered in settlement; (4) the risk of maintaining class status through trial;
 14 (5) the extent of discovery completed and the stage of the proceedings; (6) the
 15 experience and views of counsel; (7) the presence of a governmental participant;
 16 and (8) the reaction of the class members to the proposed settlement. *Linney*, 151
 17 F.3d at 1242. These factors all support approval of the proposed Settlement.

18 **1. Strength of Plaintiffs' Case, and the Risk, Expense,**
 19 **Complexity and Likely Duration of Further Litigation**

20 While Plaintiffs survived Defendants' motion to dismiss, to succeed in
 21 establishing liability Plaintiffs would have to prove both that IsoRay's May 20,
 22 2015 Press Release was false and/or misleading *and* that Defendants acted with
 23 scienter in issuing the alleged false and misleading aspects of the Press Release.

24 The claims in this action were brought under Section 10(b) and 20(a) of the

1 Securities Exchange Act of 1934 (“Exchange Act”) under the theory that
 2 Defendants materially misrepresented the results of the Study by touting those
 3 results in a press release in an incomplete and materially misleading fashion.

4 **a. Difficulty of Proving Exchange Act Claims**

5 In addition to the general risks of any litigation, a heightened risk existed
 6 because this Action is subject to the provisions of the Private Securities Litigation
 7 Reform Act of 1995 (“PSLRA”), which significantly raised the standard for
 8 investors to successfully prosecute securities class actions. “[S]ecurities class
 9 actions are ... notably difficult and notoriously uncertain to litigate.” *City of*
 10 *Providence v. Aeropostale, Inc.*, No. 11-7132, 2014 U.S. Dist. LEXIS 64517, *14
 11 (S.D.N.Y. May 9, 2014) (internal quotation marks omitted); *In re Heritage Bond*
 12 *Litig.*, No. 02-1475, 2005 U.S. Dist. LEXIS 13555, *25 (C.D. Cal. June 10, 2005)
 13 (“[i]t is known from past experience that no matter how confident one may be of
 14 the outcome of litigation, such confidence is often misplaced.”).

15 **i. Risk of Proving Falsity and Scienter**

16 Obtaining a favorable jury finding on the elements of falsity and scienter is
 17 hardly a foregone conclusion. In order to establish falsity, Plaintiffs would have to
 18 demonstrate that the Press Release conveyed a false or misleading impression,
 19 based upon the information that was then available to the market. *In re Convergent*
 20 *Techs. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991). While Plaintiffs were
 21 successful in establishing this at the motion to dismiss stage, Defendants invariably
 22 would have asserted a “truth-on-the-market” defense at trial, arguing that the
 23 allegedly omitted information that Plaintiffs argued rendered the Press Release
 24 misleading was already available given the publication of the Study and the abstract

1 before the issuance of the Press Release. While Plaintiffs are confident that a jury
2 would not credit this affirmative defense, there are of course no guarantees.

3 In order to establish scienter, Plaintiffs must show “that defendants knew
4 their statements were false,” or “that defendants were reckless as to the truth or
5 falsity of their statements.” *In re Galena Biopharma, Inc., Sec. Litig.*, 117 F. Supp.
6 3d 1145, 1163 (D. Or. 2015) (quoting *Gebhart v. S.E.C.*, 595 F.3d 1034, 1041 (9th
7 Cir. 2010)). Recklessness must be either “‘deliberate recklessness’ or ‘conscious
8 recklessness,’ and . . . it includes a ‘subjective inquiry’ turning on ‘the defendant’s
9 actual state of mind.’” *Id.* (quoting *S.E.C. v. Platforms Wireless Int’l Corp.*, 617
10 F.3d 1072, 1093 (9th Cir. 2010)). Deliberate or conscious recklessness in this
11 context is:

12 a highly unreasonable omission, involving . . . an extreme departure from
13 the standards of ordinary care, and which presents a danger of misleading
14 buyers and sellers that is either known to the defendant or is so obvious that
15 the actor must have been aware of it. [Additionally,] the danger of
16 misleading buyers must be actually known or so obvious that any
reasonable man would be legally bound as knowing.

17 *Id.* (quoting *In re NVIDIA Corp. Sec. Litig.*, 768 F. 3d 1046, 1053 (9th Cir. 2014)).

18 Ultimately, the question “is whether defendant knew his or her statements
19 were false, or was consciously reckless as to their truth or falsity.” *Gebhart*, 595
20 F.3d at 1042. Defendants’ mere negligence will be insufficient to prove securities
21 fraud without proof of either knowledge or recklessness.

22 While Plaintiffs believe they have strong claims, securities fraud cases are
23 difficult to prove:

24 In the Ninth Circuit, to successfully plead scienter based on an omission, a

1 plaintiff must plead a highly unreasonable omission, involving not merely
 2 simple, or even inexcusable negligence, but an extreme departure from the
 3 standards of ordinary care, which presents a danger of misleading buyers
 4 or sellers that is either known to the defendant or is so obvious that the actor
 must have been aware of it.

5 *Varjabedian v. Emulex Corp.*, 152 F. Supp. 3d 1226 (C.D. Cal. 2016) (*quoting Zucco*
 6 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (internal
 7 quotation marks and original ellipses omitted).

8 This standard has been characterized as “extremely difficult to meet, because
 9 even clear misconduct does not always raise a strong inference of scienter.” *Id.*
 10 (*citing In re NVIDIA Corp. Sec. Litig.*, No. 08-4260, 2011 U.S. Dist. LEXIS
 11 117807, *36 (N.D. Cal. 2011), *affirmed*, *In re NVIDIA Corp.*, 769 F.3d 1046). For
 12 instance, in *In re NVIDIA Corp. Sec. Litig.*, the District Court noted there was no
 13 strong inference of scienter even when a company knew of a significant product
 14 defect and failed to disclose it to investors because “such behavior, at worst, reflects
 15 recklessness in the ordinary sense of the word.” 2011 U.S. Dist. LEXIS 117807, *8.
 16 Proving scienter is particularly difficult when there is no insider selling while the
 17 stock price was inflated as a result of the alleged misrepresentations. *See In re Am.*
 18 *Apparel S’holder Litig.*, No. 10-6352, 2014 U.S. Dist. LEXIS 184548, *28 (C.D.
 19 Cal. July 28, 2014).

20 Plaintiffs were tasked with the difficult challenge of proving scienter with
 21 respect to Defendants’ omissions and misrepresentations. In fact, Defendants
 22 argued and would have continued to argue that Plaintiffs could not prove scienter
 23 because, among other things, Defendants had provided a link to the Study in the
 24 Press Release itself. Although not an insurmountable burden, Plaintiffs did
 acknowledge the risk in meeting a difficult standard in settlement of this Action.

1 **ii. Risk of Proving Loss Causation and Damages**

2 Plaintiffs would also have had to prove loss causation — i.e., that it was the
3 revelation of the fraud that caused the price of IsoRay’s stock to fall, and that the
4 Settlement Class suffered damages as a result. These elements can only be proven
5 through expensive, complex, and risky expert testimony. *In re Pfizer Inc. Sec. Litig.*,
6 No. 04-9866, 2014 U.S. Dist. LEXIS 92951, **19, 20 (S.D.N.Y. July 8, 2014)
7 (entering summary judgment in favor of defendants after excluding Plaintiffs’
8 experts on damages pursuant to *Daubert*); *see also In re Am. Apparel, Inc. S’holder*
9 *Litig.*, No. 10-6352, 2014 U.S. Dist. LEXIS 184548, *94 (C.D. Cal. July 28, 2014)
10 (plaintiffs must turn to experts to disaggregate losses from nonactionable and
11 actionable factors).

12 Defendants would retain their own experts, who would testify that other
13 factors caused IsoRay’s stock price collapse. In this “battle of experts,” it is virtually
14 impossible to predict which testimony would be credited and, ultimately, which
15 damages would be found to have been caused by actionable rather than
16 nonactionable factors such as general market conditions. *In re Warner Comm. Sec.*
17 *Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985); *see also Aarons v. BMW of N.*
18 *Am., LLC*, No. 11-7667, 2014 U.S. Dist. LEXIS 118442, *26 (C.D. Cal. Apr. 29,
19 2014) (“battle of the experts” are “inherently risky”).

20 Although Plaintiffs are confident there are minimal loss causation issues in
21 this matter, there is still risk inherent in the battle of experts that would ensue.
22 Defendants argued and would have continued to argue that IsoRay’s stock price *did*
23 *not* react to the publication of the Study itself and that the Study was already
24 available to the marketplace when the Press Release and subsequent Feuerstein

1 article were published. Plaintiffs have given due consideration to these risks in
2 settling this Action.

3 **b. Pragmatic Considerations**

4 Continued litigation would be risky and expensive. Regardless of the ultimate
5 outcome, there is no question that further litigation would be expensive and
6 complex. It is widely acknowledge that class-action litigation is inherently complex.
7 *See, e.g., Nobles v. MBNA Corp.*, No. 06-3723, 2009 U.S. Dist. LEXIS 59435
8 (N.D. Cal. June 29, 2009) (finding a proposed settlement proper “given the inherent
9 difficulty of prevailing in class action litigation”). Courts recognize that securities
10 class actions, in particular, are typically complex and expenses to prosecute. *See,*
11 *e.g., Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555. This securities action is
12 no exception.

13 For class certification, Plaintiffs would have had to procure expert opinions
14 on market efficiency (as would Defendants). Class certification would have
15 involved continued discovery including expert depositions, briefing, and argument.
16 Joint Decl. at ¶ 18.

17 With respect to merits discovery, the Parties could anticipate — given the
18 complexities of the issues — reviewing thousands of documents and taking a
19 substantial number of depositions, including depositions of Defendants,
20 Defendants’ personnel, and personnel involved with the Study, as well as third-
21 parties involved with the Study. Following the close of merits discovery, Plaintiffs
22 would have to procure expensive and complex expert testimony to prove loss
23 causation and damages. Joint Decl. ¶ 19. The Parties would engage in expert
24 discovery on those issues. Defendants would present their own expert testimony to

1 demonstrate that the alleged stock drop was not proximately caused by the
 2 revelation of the fraud, and/or attempt to demonstrate that at least a portion of the
 3 alleged stock drop was attributable to other things unrelated to the revelation of the
 4 fraud. Joint Decl. ¶ 20. Consequently, expert discovery and trial preparation would
 5 be expensive and complex. *See Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555
 6 (class actions have a well-deserved reputation as being the most complex).

7 The likely duration and expense of further litigation also supports a finding
 8 that the Settlement is fair, reasonable, and adequate. Even if a class had been
 9 certified and Plaintiffs withstood Defendants' likely motion for summary judgment,
 10 continued prosecution of the action would be complex, expensive, and lengthy with
 11 a more favorable outcome than the Settlement highly uncertain. *See Browne v. Am.*
 12 *Honda Motor Co.*, No. 09-6750, 2010 U.S. Dist. LEXIS 145475 (C.D. Cal. July 29,
 13 2010) ("Had the parties aggressively litigated class certification and tried the case,
 14 it could have consumed substantial party and court resources. There is a 'strong
 15 judicial policy that favors settlements, particularly where complex class action
 16 litigation is concerned.'").

17 After trial, any appeal would have to be resolved by the Ninth Circuit, one of
 18 the busiest circuit courts in the nation. Thus, the present value of a cash recovery at
 19 this time, as opposed to the mere chance for a greater one down the road, supports
 20 approval of a settlement that eliminates the expense and delay of continued
 21 litigation, as well as the risk that the Settlement Class could receive no recovery.

22 At this point, over twenty months into the Litigation, Plaintiffs are aware of
 23 the strengths and weakness of their case. Despite the perceived strength of
 24 Plaintiffs' case, the risk, expense, complexity, and likely duration of further

1 litigation clearly support approval of the Settlement. *See In re Syncor Litig.*, 516
 2 F.3d 1095 (9th Cir. 2008) (finding the district court abused its discretion in granting
 3 defendants’ summary judgment motion after the parties notified the court of
 4 entering into a binding class action settlement); *Nat’l Rural Telecomms. Coop. v.*
 5 *DirecTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (“[U]nless the settlement is
 6 clearly inadequate, its acceptance and approval are preferable to lengthy and
 7 expensive litigation with uncertain results.”).

8 Additionally, a defendant’s strained financial condition supports approval,
 9 and indeed “predominate[s]” over other factors. *Torrisi v. Tucson Elec. Power Co.*,
 10 8 F.3d 1370, 1376 (9th Cir. 1993) (financial condition of the Company
 11 “predominated” over other factors in favor of settlement); *see also In re Ikon Office*
 12 *Solutions, Inc.*, 194 F.R.D. 166, 183 (E.D. Pa. 2000).

13 Defendants’ financial condition counsels in favor of settlement. IsoRay has a
 14 market cap of approximately \$32 million with a 200-day Moving Average of \$0.69
 15 per share and a 50-day Moving average of \$0.60 per share. According to its most
 16 recent 10-Q, the Company has cash and cash equivalents of \$8.4 million.
 17 Defendants’ only major asset is its Cesium-131 brachytherapy seed, which has been
 18 approved by the FDA and can be prescribed for the treatment of cancers. Even if
 19 Plaintiffs had received a judgment for the maximum amount of damages years down
 20 the road that had survived the inevitable appeals, it is uncertain how much of that
 21 judgment Plaintiffs would be able to collect on.

22 The Settlement provides for recovery of \$3,537,500, which is 17.5% of
 23 Plaintiffs’ maximum estimated damages. The Settlement confers an immediate,
 24 reasonable, and valuable cash benefit to the Class — one that negates the very real

1 risks to recovery posed by continued litigation.

2 **2. The Amount Offered in the Settlement Favors Approval**

3 The determination of a “reasonable” settlement is not susceptible to a
 4 mathematical equation yielding a particularized sum. Nor is the proposed
 5 Settlement “to be judged against a hypothetical or speculative measure of what
 6 might have been achieved by the negotiators.” *Officers for Justice*, 688 F.2d at 625.
 7 As “[s]ettlement is the offspring of compromise[,] the question we address is not
 8 whether the final product could be prettier, smarter or snazzier, but whether it is
 9 fair, adequate and free from collusion.” *Hanlon*, 150 F.3d at 1027. “Naturally, the
 10 agreement reached normally embodies a compromise; in exchange for the saving
 11 of cost and elimination of risk, the parties each give up something they might have
 12 won had they proceeded with litigation.” *Officers for Justice*, 688 F.2d at 624. In
 13 fact, a settlement may be acceptable even if it amounts to only a fraction of the
 14 potential recovery that might be available at trial. *See Mego*, 213 F.3d at 459.

15 Co-Lead Counsel engaged a consultant to assist in estimating potentially
 16 recoverable damages. Estimating damages can be challenging due to, among other
 17 things, assumptions that must be made regarding trading activity. The estimate of
 18 potential maximum recoverable damages, assuming that Plaintiffs prevailed on *all*
 19 claims and overcame *all* defenses, was at most approximately \$20.3 million. Joint
 20 Decl. ¶ 21. But that number would be reduced or eliminated entirely if the Court or
 21 jury accepted some or all of Defendants’ defenses, including their claims that a
 22 portion or all of the losses are attributable to causes other than the alleged
 23 misstatements or omissions. Had the case been tried, there was a fair possibility that
 24 the damages could have been lower or even zero. *See, e.g., Heritage Bond Litig.*,

2005 U.S. Dist. LEXIS 13555, *26 (citing *In re Sumitomo Cooper Litig.*, 189 F.R.D. 274, 282 (S.D.N.Y. 1999) (where the court recounted several instances where settlement was rejected by a court only to have the recovery generated by continued litigation ultimately be less than the proposed settlement))).

Defendants' payment of \$3,537,500 in cash to the Class constitutes 17.5% of Plaintiffs' maximum estimated damages and is an outstanding result for the Class. Indeed, settlements valued at a substantially similar or much lower percentage of possible damages are routinely approved. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 241 (3d Cir. 2001) (noting that typical recoveries in securities class actions range from 1.6% to 14% of total losses). *See Joint Decl. at Ex. D* (excerpts from Svetlana Starykh and Stefan Boettsch, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* (NERA 25 Jan. 2016) at 33, Fig. 29 (the median ratio of settlements between 1996 and 2015 to investment losses was 8.6% for cases alleging investor losses of between \$20 and \$49 million); at 34, Fig. 30 (the median ratio of settlements to investor losses in 2015 was 1.6%)).

Here, the recovery provides an immediate and tangible benefit to the Settlement Class, and is well within a range of reasonableness in light of the best possible recovery and the substantial risks presented by the litigation. The 17.5% recovery as a percentage of damages is approximately double the median percentage in cases of comparable size. *Joint Decl. ¶ 22.*

3. Risk of Maintaining a Class Action

The Settlement Class has been preliminarily certified for settlement purposes only. If not for this Settlement, Defendants would have strongly contested class certification and, if certified, would have sought every opportunity to have the class

1 de-certified. Rule 23(c)(1) expressly provides that a class certification order may be
 2 “altered or amended before final judgment.” *See, e.g., Viscaino v. U.S. District*
 3 *Court*, 173 F.3d 713, 721 (9th Cir. 1999) (certification order may be altered or
 4 amended “before the decision on the merits”).

5 Because maintaining a class action to judgment is an expensive and risky
 6 enterprise, a fair and reasonable settlement is preferable to years of uncertainty. *See*
 7 *Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, *26 (“[i]n most situations,
 8 unless the settlement is clearly inadequate, its acceptance and approval are
 9 preferable to lengthy and expensive litigation with uncertain results”) (citing
 10 *National Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal.
 11 2004) (internal quotation omitted)).

12 Because the scope of a class-wide judgment is a greater detriment to
 13 Defendants than an individual action, even after an adjudication on the merits, the
 14 risk of ultimately not prevailing remains high. *See, e.g., National Rural*, 221 F.R.D.
 15 at 527 (if a class action obtains a successful judgment, an appeal is likely to follow);
 16 *see also Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997 (jury verdict
 17 of \$81 million for plaintiffs against an accounting firm reversed on appeal).

18 **4. Stage of the Proceedings**

19 Plaintiffs had sufficient information to evaluate their case and to assess the
 20 propriety of a settlement. Here, by the time the Settlement was reached, Plaintiffs
 21 and Co-Lead Counsel had the benefit of: (a) an extensive investigation; (b) this
 22 Court’s opinion on Defendants’ motion to dismiss; (c) consultation with market
 23 efficiency and damages experts; (d) third-party discovery; and (e) adversarial
 24 mediation briefing, discussions at the mediation, and the mediator’s evaluation of

1 the merits. Joint Decl. ¶¶ 23.

2 The parties need not have engaged in more extensive formal discovery as
 3 long as they have engaged in sufficient investigation of the facts to enable the
 4 parties and the Court to intelligently make an appraisal of the Settlement. *Linney v.*
 5 *Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) ("In the context of
 6 class action settlements, 'formal discovery is not a necessary ticket to the bargaining
 7 table' where the parties have sufficient information to make an informed decision
 8 about settlement). *In re TD Ameritrade Acc't Holder Litig.*, No. 07-2852, 2011 U.S.
 9 Dist. LEXIS 103222 (N.D. Cal. Sep. 13, 2011) (approving settlement after the filing
 10 of a motion to dismiss and prior to significant discovery).

11 Plaintiffs and Co-Lead Counsel were in an excellent position to evaluate the
 12 strengths and weaknesses of their allegations against Defendant, and the defenses
 13 raised thereto, as well as the substantial risks of continued litigation, and to be in a
 14 position to conclude that the Settlement provides a fair, adequate, and reasonable
 15 recovery, and is in the best interests of the Class. *Roberti*, No. 13-9174, 2015 U.S.
 16 Dist. LEXIS 164312, *9 (C.D. Cal. Dec. 8, 2015) (similar stage of proceedings
 17 weighs in favor of final approval).

18 **5. Experienced Counsel Concur that the Settlement,**
 19 **which Was Negotiated in Good Faith and at**
 20 **Arm's-Length, Is Fair, Reasonable, and Adequate**

21 "Parties represented by competent counsel are better positioned than courts
 22 to produce a settlement that fairly reflects each party's expected outcome in
 23 litigation." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009).
 24 *Accord, In re Cathode Ray Tube Antitrust Litig.*, No. 07-5944, 2016 U.S. Dist.
 LEXIS 24951, **222-23 (N.D. Cal. Jan. 28, 2016) (citing *Ellis v. Naval Air Rework*

1 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (“[T]he fact that experienced counsel
2 involved in the case approved the settlement after hard-fought negotiations is
3 entitled to considerable weight.”)).

4 A “presumption of correctness is said to attach to a class settlement reached
5 in arms-length negotiations between experienced capable counsel after meaningful
6 discovery.” *Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, *26 (citing
7 *Manual for Complex Litigation (Third)* § 30.42 (1995)).

8 This case has been litigated by experienced and well-respected counsel on
9 both sides. Indeed, Plaintiffs’ Counsel has been litigating on behalf of IsoRay
10 investors since mid-2015, Plaintiffs’ Counsel is intimately familiar with the
11 strengths and weaknesses of the case and the core facts, and wholeheartedly
12 recommends this Settlement as fair, reasonable, and adequate. Indeed, Plaintiffs’
13 Counsel believes that the Settlement is an excellent result for the Class. *See Joint*
14 *Decl.* ¶ 24.

15 Co-Lead Counsel has many years of experience in litigating securities class
16 actions throughout the country — including within this Circuit and District in
17 particular — and in assessing the respective merits of each side’s case. *Joint Decl.*
18 ¶ 25, Exs. A & B (Co-Lead Counsel’s firm résumés). Additionally, throughout the
19 litigation and settlement negotiations, Defendants have been represented by very
20 skilled and highly respected counsel at Wilson Sonsini, a top nationally and
21 internationally regarded firm with solid experience in defending securities class
22 actions. *Joint Decl.* ¶ 26. Defendants’ counsel brought considerable experience and
23 expertise to bear and vigorously defended this Action.

24 In the face of this knowledgeable and formidable defense, Co-Lead Counsel

1 were nonetheless able to develop a case that was sufficiently strong to tentatively
 2 overcome the heightened pleading standard of the PSLRA, and persuade
 3 Defendants and their insurance carriers to settle on terms that are favorable to the
 4 Settlement Class. That Co-Lead Counsel recommend the settlement in these
 5 circumstances is entitled to a presumption of correctness.

6 Lead and Named Plaintiffs also support the Settlement. Joint Decl. ¶ 27 and
 7 Exs. F-J. This is additional evidence that the Settlement is fair, reasonable, and
 8 adequate. Under the PSLRA, the Lead Plaintiffs' support for a settlement should be
 9 accorded "special weight because [the Lead Plaintiffs] may have a better
 10 understanding of the case than most members of the class." *DirecTV*, 221 F.R.D. at
 11 528 (quoting *Manual for Complex Litigation (Third)* § 30.44 (1995)). Lead
 12 Plaintiffs' support favors Court approval.

13 Further, the Settlement was brokered with the aid of a professional mediator,
 14 Michelle Yoshida, Esq. The parties engaged in hard-fought negotiations over the
 15 course of a full-day, with Co-Lead Counsel, defense counsel, and Defendants'
 16 representatives and insurance carriers. The negotiations were in good faith and at
 17 arms'-length. Though professional, the discussions were zealous and even heated;
 18 there was no collusion. Joint Decl. at ¶ 28. As a result of these long and hard-fought
 19 negotiations, the parties agreed to settle this Action for \$3,537,500. Only after
 20 these protracted and good faith negotiations did the parties finally agree to all the
 21 terms of the settlement reflected in the Stipulation. Joint Decl. at ¶ 29.

22 **6. The Reaction of the Class Members to the Settlement**

23 Pursuant to the Court's Notice Order, over 12,000 notices were sent to Class
 24 Members to date and Summary Notice was published in *Investors' Business Daily*

on October 31, 2016. Joint Decl. at ¶ 30. The deadline to exclude oneself from the settlement is February 4, 2017 and the deadline to object to the settlement is February 15, 2017. Joint Decl. at ¶ 31. To date, only one request for exclusion and *no objections* have been received to the Settlement, Plan of Allocation, or any other aspect of the Settlement. *Id.* “[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness.” *Hanlon*, 150 F.3d at 1027; *see also Mego Fin. Corp.*, 213 F.3d at 458.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

“Approval of a settlement, including a plan of allocation, rests in the sound discretion of the court.” *Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, *26. “When formulated by competent and experienced class counsel, an allocation plan need have only a ‘reasonable, rational’ basis.” *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004). *See also In re Cathode Ray Tube*, 2016 U.S. Dist. Lexis 88665, **223-24.

“A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable. It is also reasonable to allocate more of the settlement to class members with stronger claims on the merits.” *In re Oracle Sec. Litig.*, No. 90-931, 1994 U.S. Dist. LEXIS 21583, *3 (N.D. Cal. June 18, 1994). *See also In re Cathode Ray Tube*, 2016 U.S. Dist. Lexis 88665, * 25 (“[A]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel.”).

The proposed Plan of Allocation was fully described in the Notice sent to the Class, at pages 4-6. It was formulated by Lead Counsel, in consultation with an

1 independent damages expert, with the goal of reimbursing Class members in a fair
 2 and reasonable manner. Each similarly situated authorized claimant will receive a
 3 *pro rata* share of the Net Settlement Fund (*i.e.*, \$3,537,500 plus interest, less
 4 attorneys' fees and expenses). The Plan of Allocation does not discriminate between
 5 Class Members. In short, the Plan of Allocation has a rational basis and fairly
 6 compensates Class Members. This Court should approve it.

7 **IV. CONCLUSION**

8 Because the Settlement and the Plan of Allocation are fair, reasonable, and
 9 adequate, Plaintiffs respectfully request that the Court enter the Proposed Final
 10 Order and Judgment finally approving the Settlement as fair, reasonable and
 11 adequate.

12 DATED: January 31, 2017

Respectfully submitted,

13 LAW OFFICES OF

14 CLIFFORD A. CANTOR, P.C.

15 s/ Cliff Cantor

16 Cliff Cantor, WSBA # 17893

627 208th Ave. SE

17 Sammamish, WA 98074

18 Tel: (425) 868-7813

19 Fax: (425) 732-3752

Email: cliff.cantor@outlook.com

Liaison Counsel for Plaintiffs

20 THE ROSEN LAW FIRM, P.A.

21 s/ Philip Kim

22 Laurence M. Rosen

Phillip Kim (admitted *pro hac vice*)

23 Sara Fuks (admitted *pro hac vice*)

275 Madison Avenue, 34th Floor

24 New York, NY 10016

Tel: (212) 686-1060-2610

Fax: (212) 202-3827
Email: lrosen@rosenlegal.com
pkim@rosenlegal.com
sfuks@rosenlegal.com

Lead Counsel for Plaintiffs

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
s/ Matthew M. Guiney
Matthew M. Guiney (admitted *pro hac vice*)
270 Madison Ave.
New York, NY 10016
Tel: (212) 545-4600
Email: Guiney@whafh.com

Lead Counsel for Plaintiffs

Certificate of Service

I certify that, on the date stamped above, I caused this document to be filed with the Clerk of the Court using the CM/ECF system, which will cause notification of filing to be emailed to all parties via their counsel of record.

s/ Cliff Cantor, WSBA # 17893